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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, CARPENTERS DISTRICT COUNCIL OF DENVER AND VICINITY, AFL-CIO, PETITIONER,

v.

HENSEL PHELPS CONSTRUCTION COMPANY, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Respondent above named prays that a writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Petitioner would have this Court believe that the Court of Appeals has erroneously decided an important federal question by somehow unlawfully impeding the right of employees to strike. It is here contended that such an interpretation by the Petitioner constitutes a gross misinterpretation of the decision of the Court of Appeals. The Court of Appeals decided this matter solely as a contract question, pure and simple.

Although both sides presented arguments below regarding the applicability of a no strike clause, the Court of Appeals specifically accorded the Union the right to engage in a strike or work stoppage, the exercise of which, under the circumstances, would not give rise to damages. The decision of the Court of Appeals, in fact, states at page 15:

> "The contract does not contain a 'no strike' clause and, as we have seen, it does not provide for binding and compulsory arbitration. Thus after the contractual dispute procedure proved ineffective to resolve the dispute, the parties were free to pursue their other remedies. The device selected by the Union was a work stoppage." (Emphasis supplied)

Thus, the Court of Appeals specifically accorded to the Union the right to engage in a strike or work stoppage. The basis

for the decision in Respondent's favor and the awarding of damages was not because of the work stoppage, but because the Union caused Respondent to pay a higher wage rate in violation of the executed building contract, and hence the Petitioner was liable as a matter of basic contract law for damages. The decision of the Court of Appeals does not, as Petitioner would interpret it, say that the Union had a right to strike, but may be held in damages for exercising its right (Petitioner's Brief, Page 7). Thus, the whole of Petitioner's argument, which involves the protection of the Union's sacred right to strike, must of necessity have no applicability to the decision of the Court of Appeals.

It seems readily apparent, from reading the decision of the Court of Appeals, that said Court awarded damages to the Respondent, not because of the work stoppage, but because the Union caused Respondent to pay the higher wage rate, by its insistence upon erroneously interpreting the building agreement. In this regard, note the language of the Circuit Court at page 11 of its decision:

> "As indicated above, the disagreement between the parties centered about <u>one issue</u>. Was the elevated drive building work, or was it highway work? .... The dispute here is fundamental, for it questions which of the two contracts should

apply to the elevated drive. Until the underlying question of fact was determined, that is, classification of the elevated drive as building or highway work, the parties could not know which wage scale to use." (Emphasis supplied)

It is quite obvious that the issue before the Court of Appeals and the decision rendered by it were in no manner related to the fact that the Union struck to enforce its interpretation of the building agreement. Such is to say that damages were not awarded to the Union because it struck and caused a work stoppage, but because of the Union's insistence upon interpreting the building agreement incorrectly so that the higher rate of pay applied. If the Court had held that the breach of the agreement for which damages were allowed was caused by the Union's action in striking and causing a work stoppage, then the question of which rate of pay applied would have been irrelevant. The Union would be liable in damages because of the work stoppage. Had the Circuit Court found that damages were owed to Respondent because of the strike, what would those damages have been? The damages because of the strike and the work stoppage are normally damages such as any penalty the Respondent would have paid because of a delay, extra costs which it incurred in maintaining the project during the strike, lost profits, etc. However, no such damages were granted by

either the District Court or the Court of Appeals. Instead, both the District Court and the Circuit Court limited the measure of damages solely to the difference between the rate of pay in the highway contract as compared with the rate of pay in the building contract (Ct. of App. Decision, Page 17-18). Certainly, the actual damages granted were not as a result of any strike. They were simply a result of the judicial determination as to which contractual rate applied.

Thus, the Court of Appeals merely affirmed the finding of the United States District Court which found on the evidence that the work was highway construction work. Under Rule 52 Fed. R. Civ. Proc. and numerous case decisions, this finding should not be overturned. The Union received a windfall based on its breach of contract and it must make Phelps whole for its unjust enrichment.

Had the Court decided that the higher rate of pay was contractually proper, no damages would have been granted to the Respondent. As a consequence, the Court of Appeals' determination was simply and totally a matter of contractual interpretation, and in no wise resulting in any determination dealing with possible damages which may have occurred as the result of a strike and a work stoppage. Certainly in this decision there is no substantial federal question or any matter of substan-

tial public policy or interest which would make this an appropriate case for granting of a writ of certiorari.

CONCLUSION

It is, therefore, respectfully submitted that for the foregoing reasons the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED:

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